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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No. 278

RALPH L. BORN,
Petitioner,

vs.

R. J. LAUBE, Administrator of the Estate of George Cease, deceased, and LOCAL UNION No. 959, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The above-named petitioner respectfully prays that a writ of certiorari be issued to review the judgment

of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled cause affirming the judgment of the District Court of the Territory of Alaska, Third Judicial Division, decided May 26, 1954, and the judgment of said Court overruling the Petition for Rehearing, rendered and filed on July 15, 1954, in cause No. 13,304, of said United States Court of Appeals for the Ninth Circuit.

JURISDICTION.

The judgment of the Court of Appeals affirmed the District Court of the Territory of Alaska, Third Judicial Division, decided, filed and entered on May 26, 1954, in United States Court of Appeals No. 13,304, not yet officially reported, and the Order, Judgment and Decree of the United States Court of Appeals for the Ninth Circuit denied the Petition for Rehearing in the same numbered case, decided, filed and entered on July 15, 1954. Jurisdiction of this Court is invoked under Sections 1254 and 2101 of the Judicial Code (Act of June 25, 1948, c. 646, secs. 1254, 2101; 62 Stat. 928, 961; 28 U.S.C. 1254, 2101), and Rule 21 of the Revised Rules of the Supreme Court of the United States, and any and all other rules of this Court affecting appeals from the various Circuit Courts of Appeals to the United States Supreme Court.

QUESTION PRESENTED FOR REVIEW.

The question involved is whether the Labor Management Relations Act of 1947, has given exclusive jurisdiction to the National Labor Relations Board over the subject matter of a common law tort action for damages, as to preclude an appropriate territorial court of the Territory of Alaska from hearing and determining its issues, by reason of the fact that the tortious acts complained of also constituted an unfair labor practice under that Act.

The District Court of the Territory of Alaska held that the Act gave exclusive jurisdiction to the National Labor Relations Board, and the Court of Appeals for the Ninth Circuit upheld the decision. Our contention is that the Act did not take away from the jurisdiction of State, Territorial and District Courts of the United States the right to hear and determine common law tort actions simply because the tortious acts also constituted unfair labor practices under that Act.

STATUTES INVOLVED.

The decision involves Section 10, subdivision (a), of the National Labor Relations Act, as amended by the Labor Management Relations Act (61 Stat. 146, 29 U.S.C. (1952 ed.) para. 160(a), 29 U.S.C.A. para. 160(a), reading as follows:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *."

STATEMENT OF THE CASE.

Petitioner, Ralph Born, filed a common law tort action charging the defendants with many tortious acts, including unlawfully denying him reinstatement in the local union, driving him off of a job that he had previously acquired, causing false reports to be made to the military authorities, that he was a bad security risk, causing the military authorities to take from him his pass to work for his employer on the military base, known as Fort Richardson, which conduct required the plaintiff to go to the District Attorney at Anchorage, and to the Federal Bureau of Investigation, and to employ an attorney to protect his reputation and to establish his innocence of being a bad security risk, and that he was kept from his employment by reason thereof for some time. After thorough investigation the military authorities restored to plaintiff his good standing, and returned to him his permit, resulting in several months of unemployment and loss of salary, extreme embarrassment and humiliation. The case was tried to a jury, presided over by the Honorable Anthony J. Dimond, District Judge. The jury found for the plaintiff in the sum of Three Thousand Dollars ($3,000.00) compensatory damages, and Five Thousand Dollars ($5,000.00) as punitive damages, and on a Motion for a New Trial the Honorable Anthony J. Dimond sustained a Motion to Dismiss plaintiff's cause of action, having found all issues in favor of the plaintiff, save and except the sole and only issue as to whether or not the Labor Management Relations Act of 1947 had given the

National Labor Relations Board exclusive jurisdiction over the subject matter of a common law tort action for damages, so as to preclude the Court from hearing and determining its issue, because such conduct would constitute an unfair labor practice under that Act. The opinion of the Honorable Anthony J. Dimond is set out in the transcript of the record on appeal to the Circuit Court of Appeals for the Ninth Circuit, in cause No. 13,342, commencing on page 28 thereof, and continuing over to and including page 32, as follows, to-wit:

> "There now remains the question of jurisdiction, whether in this Court or in the National Labor Relations Board, or in either at the option of the plaintiff. That problem may be resolved by the answers to three questions, all of which must be answered in the affirmative to conclude that this Court lacks jurisdiction:
>
> "(1) Was the work in which plaintiff was engaged 'commerce' within the meaning of the Act of 1947, and thus brought within the scope of that law?
>
> "(2) Is the issue raised here by the pleadings an 'unfair labor practice' under the terms of the Act?
>
> "(3) Assuming that the correct answer to each of the above questions is 'yes', then is exclusive jurisdiction of the issue in the National Labor Relations Board?
>
> "The answer to the first question must be 'yes' because of the explicit words of the Act. Alaska is a Territory of the United States and Congress is its Master-Legislator. In Alaska, by the ex-

press terms of the Act, there is no requirement that the commerce be 'interstate' in its nature, as indicated by Title 29, Sec. 152 (6) USCA quoted below:

> " 'The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.'

"The answer to the second question must likewise be 'yes' by reason of the provisions of the Act of 1947 embraced in Title 29, Sec. 158 (b) USCA, as follows:

> " '(b) It shall be an unfair labor practice for a labor organization or its agents——
>
> * * * * * * *
>
> " '(2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership';

"The third problem is not so simple of solution. The difficulty arises out of the changes made in the National Labor Relations Act by the Labor

Management Relations Act of 1947. The two corresponding paragraphs are quoted below:

"Title 29, Sec. 160 (a) USCA

"(National Labor Relations Act)

" 'The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.'

"Title 29, Sec. 160 (a) USCA

"(Labor Management Relations Act)

" 'The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter

or has received a construction inconsistent therewith.'

"No suggestion has been made that the Act of 1947 explicitly states the jurisdiction of the Board to be exclusive. The question then is brought forward as to whether the phrase contained in the National Labor Relations Act, 'This power shall be exclusive,' was omitted to give the Courts concurrent jurisdiction of all causes of action having to do with labor relations or merely to give to the Courts the limited jurisdiction outlined in the Act of 1947. The conclusion here arrived at is that Courts have not by the Act of 1947 been given concurrent jurisdiction, but only that jurisdiction explicitly provided for in the latter act. Amazon Cotton Mill Co. v. Textile Workers Union, 4th Cir., 1948, 167 F.2d 183, 185; International Longshoremen's and Warehousemen's Union v. Sunset Line & Twine Co., Calif. 1948, 77 F. Supp. 119; Schatte v. International Alliance, 9th Cir. 1950, 182 F.2d 158, certiorari denied, 340 U.S. 827; Ryan v. Simons, 1950, 100 NYS 2d 18, affirmed by the New York Court of Appeals, 98 NE 2d 707. Juneau Spruce Corporation v. International Longshoremen's & Warehousemen's Union, 1949, 12 Alaksa 260, 83 F. Supp. 224, affirmed 189 F.2d 177, does not bear on question here presented.

"By reason only of lack of jurisdiction in this Court, the action must be dismissed.

"Dated at Anchorage, Alaska, this 26th day of December, 1951.

"/s/ Anthony J. Dimond,
"District Judge.

"Endorsed: Filed December 26, 1951."

This matter was argued in the Circuit Court of Appeals for the Ninth Circuit, and the Court affirmed the District Court by its decision of May 26, 1954, which opinion is not officially printed at this time, and by said opinion held that by reason of the wording of the National Labor Relations Act in authorizing the Board to require reinstatement and to require back pay took away from the trial courts any right to assess actual damages or punitive damages, and precluded him from enforcing his private right in an action at common law. A portion of the decision of the Circuit Court of Appeals, which is decisive of the question there involved, is as follows:

> "It is argued that the Board, although having authority to require the offending union to reinstate and financially to make whole the victim of the unfair labor practice, is without power to assess punitive damages; consequently, the view should be taken that Congress did not intend to preclude the victim from enforcing this private right in an action at common law. However, we think it evident that since the Act provides a procedure for redress and a corresponding remedy, both the procedure and the remedy are exclusive in the absence of an express provision or Board delegation to the contrary. As said in Nathanson v. NLRB, 344 U.S. 25, 27: 'A back pay order is a reparation order designed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice. [Citation.] Congress has made the Board the only party entitled to enforce the Act.' A remark of Justice Holmes in Charleston & Western Carolina Railway Co. v.

Varnville Furniture Company, 237 U.S. 597, 604, though dealing with an unrelated subject, is pertinent here. 'When Congress,' he said, 'has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go.'

"Decisions touching the subject under inquiry, of which there are many, have quite uniformly adhered to the view that the Act's provisions for a comprehensive remedy preclude other action by way of a different or additional remedy for the correction of the same grievance. It would be a work of supererogation to cite or to review these authorities. A very late decision of the Supreme Court, namely Garner v. Teamsters Union, 346 U.S. 485, is illustrative of the general trend of thought in that tribunal. The discussion there shows the imminent likelihood of conflict where the attempt is made to apply different remedies on the basis of an assumed distinction between rights which are public and those which are claimed, as here, to be purely private.

"Affirmed.

"(Endorsed:) Opinion. Filed May 26, 1954.

"Paul P. O'Brien, Clerk."

The opinion is in direct conflict with the opinion of the United States Supreme Court, of June 7, 1954, in cause No. 188, October Term, 1953, *United Construction Workers, Affiliated with United Mine Workers of America, et al., Petitioners, v. Laburnum Construction Corporation,* 74 S.Ct. 833, published in Supreme Court Reporter, July 1, 1954, the first two paragraphs thereof answering the question here involved.

"Mr. Justice Burton delivered the opinion of the Court.

"The question before us is whether the Labor Management Relations Act, 1947,[1] has given the National Labor Relations Board such exclusive jurisdiction over the subject matter of a common-law tort action for damages as to preclude an appropriate state court from hearing and determining its issues where such conduct constitutes an unfair labor practice under that Act. For the reasons hereafter stated, we hold that it has not."

REASON FOR GRANTING THE WRIT, WITH ARGUMENT AND BRIEF IN SUPPORT THEREOF.

In affirming the judgment of the District Court of Alaska, and in denying the Petition for Rehearing, we contend the United States Court of Appeals for the Ninth Circuit rendered a decision diametrically opposed to the decision last above stated, and by refusing to follow cases cited both in the brief of the Appellant, Ralph L. Born, and the Amicus Curiae Brief filed in said cause with the consent of said Court, by Norman W. Harris, especially the following cases discussed in said Amicus Curiae Brief on pages 14, 15 and 16, as follows, to-wit:

"In *Slocum v. L. & W. R. Co.*, 339 U.S. 239, Mr. Justice Black said:

" 'Our holding here is not inconsistent with our holding in Moore v. Illinois Central R. Co., 312 U.S. 630, 61 S. Ct. 754, 85 L. Ed. 1089. Moore was discharged by the railroad. *He could have challenged the validity of his discharge*

before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. *As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. A common-law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees.'* (Emphasis supplied.)

"Exactly the same situation prevails here. Plaintiff's action here differs from any remedy which the Board can provide.

"Again in *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, Mr. Chief Justice Stone made these remarks:

" 'Even though the dispute between the railroad and the petitioner were to be heard by the Adjustment Board, that Board could not give the *entire relief* here sought.

" 'Whether or not judicial power might be exerted to require the Adjustment Board to consider individual grievances, as to which we express no opinion, we cannot say that there is an administrative remedy available to petitioner or that resort to such proceedings in order to secure a possible administrative remedy, which is withheld or denied, is prerequisite to relief in equity. * * *

" 'In the absence of any available administrative remedy the right here asserted, to a rem-

edy for breach of the statutory duty of the bargaining representative to represent and act for the members of a craft, is of judicial cognizance. That right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction.' (Emphasis supplied.)

"Likewise the Board cannot give the entire relief here sought, and plaintiff's right here asserted will be sacrificed and obliterated if he is denied the remedy he here seeks.

"*Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768, was very similar to the *Steele* case, and the Court again held the judicial remedy available because of the lack of an adequate administrative remedy. The Court said:

" 'Here, as in the *Steele* case, colored workers must look to a judicial remedy to prevent the sacrifice or obliteration of their rights under the Act. For no adequate administrative remedy can be afforded by the National Railroad Adjustment or Mediation Board.'

"POLICE POWER OF STATES.

"The Supreme Court has recognized that the Congress, in the enactment of the National Labor Relations Act and the Labor Management Relations Act, 'designedly left open an area for state control,' and that neither of these Acts deprived the several states of their police power to deal with force and violence accompanying strikes in industries affecting interstate commerce. *Allen-Bradley Local v. Wisconsin Employment Rela-*

tions Board, 315 U.S. 740; *International Union v. Wisconsin Employment Relations Board,* 336 U.S. 245.

"The *Allen-Bradley* case involved the validity of an order of the Wisconsin Employment Relations Board, the enforcement of which had been decreed by the state court pursuant to the terms of the state statute." (Emphasis supplied.)

The Court of Appeals refused to consider the opinion of the United States Supreme Court in *Bakery Sales Drivers, Local Union 233, et al. v. Wagshal, Trading as Wagshal Delicatessen,* 333 U.S. 437, and *Columbia River Packers Association v. Hinton,* 315 U.S. 143.

While the United States Court of Appeals for the Ninth Circuit did not have the advantage of having before it at the time of the decision, the *Laburnum Construction Corporation* case, above cited, it did have said case before it when the Petition for Rehearing was denied on July 15, 1954, and should have granted the Petition for Rehearing, as the *Laburnum Construction Corporation* case decided specifically and identically the same question as was decided by the Honorable Anthony J. Dimond in the District Court for the Territory of Alaska, 101 Fed. Supplement 473, and the identical question involved on appeal to the United States Court of Appeals for the Ninth Circuit. The only question, and the question always was, whether the Labor Management Relations Act of 1947 gave the National Labor Relations Board such exclusive jurisdiction over the subject matter of a com-

mon law tort action for damages as to preclude an appropriate Court from hearing and determining its issues, where such conduct constituted an unfair labor practice under the Act. Judge Dimond, in his opinion, held that it did, and in the next to the last sentence of his opinion he stated "By reason only of lack of jurisdiction in this Court, the action must be dismissed." The United States Court of Appeals for the Ninth Circuit, in its opinion, upheld the theory that the tortious acts of the defendants constituted unfair labor practices under the Act, and therefore excluded the District Court of the Territory of Alaska of jurisdiction. In your decision of June 7, 1954, in the *Laburnum Construction Corporation* case, it was specifically held opposite. Therefore, we now have the District Court for the Territory of Alaska, and the United States Court of Appeals for the Ninth Circuit, holding in direct conflict with the opinion in the *Laburnum Construction Corporation* case, above cited.

It would be a harsh situation to deny the petitioner a writ of certiorari and deprive him of a specific right that this Honorable Court has so ably determined in the *Laburnum Construction Corporation* case, above cited.

To this Petition for Writ of Certiorari we have caused to be filed with this Court an appendix showing the proceedings had in the United States Court of Appeals for the Ninth Circuit, in cause No. 13,304, and respectfully make said appendix a part of this petition by reference, and we are causing to be filed copies of the printed record of the transcript and all briefs

filed in the Circuit Court of Appeals, used in the above-entitled cause.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Dated, Anchorage, Alaska,
July 27, 1954.

Respectfully submitted,
BAILEY E. BELL,
Attorney for Petitioner.

WILLIAM H. SANDERS,
Of Counsel.

(Appendix Follows.)